



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/540,260	01/10/2006	Andre Roberts	03094.000120.	8667
5514 7590 09/29/2009 FITZPATRICK CELLA HARPER & SCINTO 1290 Avenue of the Americas NEW YORK, NY 10104-3800				
EXAMINER				
BEKKER, KELLY JO				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
09/29/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/540,260

**Applicant(s)**

ROBERTS, ANDRE

**Examiner**

KELLY BEKKER

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 June 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 1-7 and 17-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date \_\_\_\_\_

**DETAILED ACTION**  
***Election/Restrictions***

Applicant's election without traverse of Group II, claims 8-16 in the reply filed on June 29, 2009 is acknowledged. Claims 1-7 and 17-20 have been withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected inventions, there being no allowable generic or linking claim.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 8-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "pasty" in claim 8 is unclear. It is unclear as to how the term pasty is defined and thus the meaning of pasty is unclear. For example, it is unclear as to if pasty is defined by a visual inspection and if so as to whom determines if a product is pasty or not pasty, or if there is some physical property, such as solids content that is measured to determine if a product is pasty or not pasty.

Claim 8, step d recites, "micro eras bubbles". It is unclear as to what the term "micro eras bubbles" means; it is unclear as to if the term refers to the size of the bubbles, and if so what the term requires, or if the term has some other meaning.

The term "chilled" in claim 8 is unclear. It is unclear as to if the term chilling has a specific temperature which the rollers must be below, or if the term has a specific temperature change which the rollers must be cooled. For example it is unclear as to if the chilled rollers include or exclude rollers that are at 100C and then cooled to 70C or rollers that are at 70C and cooled to 69C or rollers that are at 70C and chilled to 30C; the requirements to meet the limitations of chilling are unclear.

The term "sugar based coating" in claim 8 step f is unclear. It is unclear as to how much of a composition the sugar must be in order for the composition to be

considered "sugar based". For example, it is unclear as to if the sugar must be a certain percentage of the coating, such as over 50% or over 25%, if the sugar must be the ingredient with the highest compositional percentage, or if the term has some other meaning.

Claim 8 recites, "shelf stable confectionary product". The term shelf stable is unclear as it is unclear as to how many days or hours the confectionary product need be edible in order to be considered "shelf stable". For example, would a product be shelf stable if it was edible only until three hours of shelf storage or is a product required to be capable of shelving for a longer duration of time to be considered "shelf stable". Furthermore the specification, page 8 lines 10-14, recites "'Shelf-stable' means that the confection is stable even at elevated ambient temperatures". It is unclear as to what "elevated ambient temperatures" are.

Claim 9 recites, "rapid mixing". It is unclear as to how "rapid" the mixing process need be in order to be considered "rapid". For example it is unclear as to if a speed of 50rpm would be considered rapid and a speed of 49 rpm would not be considered rapid. The limitations of the term are unclear.

Claim 14 recites, "wherein said gas bubbles are dispersed substantially homogenously". It is unclear as to what the term "substantially homogenously" means. For example, it is unclear as how homogenous the dispersion of the gas bubbles must be in order to be or not be considered "substantially" homogenous; It is unclear as to how many of the gas bubbles can be non-homogenous (i.e. such as 5% or 40%), and the product still classify as "substantially homogenous".

Claim 15 recites, "a slab of approximate constant thickness". It is unclear as to what amount of deviation the thickness can have in order to be considered having an "approximate constant thickness". For example it is unclear if the thickness can vary by 10% or 50%, 1 mm or 10mm, etc.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 8-11 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Bouette (US 4272558).

Bouette teaches a process for making a confectionary product comprising: heating a supply of chocolate to bring it to its molten state in a mixing device and incorporating gas by stirring to form bubbles in the chocolate (Column 2 lines 9-25, Column 3 lines 24-43, and Column 4 lines 20-23 and 30-35); extruding and solidifying the chocolate (Column 2 lines 3-8 and 20-22); and coating the aerated chocolate with a non-aerated chocolate coating (Column 4 lines 53-63). Bouette teaches that the gas is incorporated into the chocolate mix by a mixing head that agitates the melted chocolate (Figure 1, Reference characters 10 and 12, Column 3 lines 24-29 and Column 4 lines 20-23 and 30-35). By teaching that the gas is uniformly distributed throughout the chocolate, Bouette teaches that the bubbles are homogenously dispersed in the chocolate (Column 3 lines 39-40).

Specifically regarding preparing a pasty or liquid chocolate mix from solid chocolate making ingredients and at least one fat and cooling said chocolate mix to about 30C to form a cooled chocolate, since Bouette teaches of "heating a supply of chocolate to bring it to its molten state" one of ordinary skill in the art would expect that the supply of chocolate transferred to the mixer as taught by Bouette is a cooled chocolate mix, i.e. a solid chocolate mix, that was previously prepared and cooled for storage at room temperature (about 25C which encompasses about 30C); and since Bouette teaches that the mix is a chocolate supply and chocolate was conventionally made from liquid chocolate mixes of fat and solid chocolate ingredients, such as milk solids and sugars, one of ordinary skill in the art would expect that the chocolate of Bouette be a prepared liquid chocolate that was formed by mixing fat and solid chocolate making ingredients, such as non-fat milk solids and sugars.

Specifically regarding the chocolate as low density chocolate, as stated above the term "low density" is unclear; however, since Bouette teaches of a chocolate to

which bubbles are added, the density of the chocolate taught by Bouette is lowered from its original point and thus Bouette teaches of a low density chocolate.

Specifically regarding the bubbles as "micro eras bubbles", as stated above the term, "micro eras bubbles" is unclear; however, since Bouette teaches of forming bubbles in chocolate by substantially the same method as instantly claimed one of ordinary skill in the art would expect that the characteristics of the bubbles as taught by Bouette be substantially the same as the instantly claimed bubbles.

Specifically regarding the air bubbles in the chocolate as having a predetermined bubble size, as Bouette teaches of controlling the size of the bubbles (Column 3 line 53 through Column 4 line 44), one of ordinary skill in the art would expect that the bubble sizes in the chocolate as taught by Bouette are predetermined.

Specifically regarding forming the chocolate into a desired shape since Bouette teaches of extruding the chocolate and as extruding is a known method of shaping, one of ordinary skill in the art would expect that the extruded chocolate as taught by Bouette is formed into a desired shape.

Specifically regarding a sugar based coating as surrounding the aerated chocolate, as discussed above the term "sugar based" is unclear; however, since Bouette teaches of enrobing the aerated chocolate with a chocolate coating and chocolate was known to contain sugar, Bouette teaches that the aerated chocolate is surrounded by a sugar based coating.

Specifically regarding the chocolate as shelf stable, as stated above the term, "shelf stable" is unclear; however, since Bouette teaches of forming bubbles in chocolate by substantially the same method as instantly claimed one of ordinary skill in the art would expect that the characteristics of the chocolate as taught by Bouette, including shelf stability, be substantially the same as the instantly chocolate.

Specifically regarding "rapid mixing", as stated above the term "rapid" mixing is unclear; however, as the same result is achieved by mixing, i.e. as Bouette teaches of forming bubbles by mixing of the chocolate, one of ordinary skill in the art would expect that the Bouette teaches of rapid mixing as instantly claimed.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bouette (US 4272558) in view of Brown et al. (US 2002/0090437 A1).

Bouette teaches a process for making an extruded confectionary product as discussed above. By teaching that the gas is uniformly distributed throughout the chocolate, Bouette teaches that the bubbles are homogenously dispersed in the chocolate (Column 3 lines 39-40). Bouette teaches of controlling the size of the bubbles (Column 3 line 53 through Column 4 line 44). Bouette is silent to the average maximum size of the gas bubbles as less than 25 microns as recited in claim 12 and the average diameter as about 17 microns as recited in claim 13.

Brown et al (Brown) teaches of an aerated chocolate with a bubble diameter of less than 60 microns and an average maximum size of 61 microns (paragraphs 0034-0037 and Figure 20). Brown teaches that bubbles should not be readily detectable in the chocolate (paragraphs 0003).

Regarding the average maximum size of the gas bubbles as less than 25 microns and the average diameter as about 17 microns, it would have been obvious to one of ordinary skill in the art for the bubble size to be low, such as less than 60 microns and less than an average maximum size of 61 microns, in order for the bubbles to not be readily detectable as taught by Brown yet high enough so that the chocolate maintained an aerated effect. To adjust the bubble size was known and routine determination of one of ordinary skill in the art as taught by Bouette and to chose a particular bubble size would depend on the organoleptic properties desired in the final product.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bouette (US 4272558).

Bouette teaches a process for making an extruded confectionary product as discussed above. Bouette is silent to the confectionary product as in the form of a slab with constant thickness as recited in claim 15.

Regarding the slab as having a constant thickness, confectionary chocolate products were known to be in several forms, including bars, i.e. slabs having a constant thickness. It would have been obvious to one of ordinary skill in the art for the extruded chocolate as taught by Bouette to be in the form of a slab with a constant thickness. One would have been motivated for the confection as taught by Bouette to be a slab as having a constant thickness if it was desired for the final product to resemble a candy bar. To chose an known shape of the confectionary product would be obvious and routine determination to one of ordinary skill in the art.

### **Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Application/Control Number: 10/540,260  
Art Unit: 1794

Page 8

/Kelly Bekker/  
Examiner  
Art Unit 1794